



DEPARTMENT OF THE ARMY
ASSISTANT SECRETARY OF THE ARMY
INSTALLATIONS, ENERGY AND ENVIRONMENT
110 ARMY PENTAGON
WASHINGTON DC 20310-0110

MAY 29 2014

2014 JUN -2 AM 10:00

OFFICE OF THE
EXECUTIVE SECRETARY

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Ms. McCarthy:

This letter concerns the EPA's proposed Resource Conservation and Recovery Act (RCRA) Section 7003 Unilateral Administrative Order, dated March 18, 2014, issued to the U.S. Army for the cleanup of the Explo Systems, Inc. site at Camp Minden, Louisiana.

I met with Ms. Cynthia Giles, your Assistant Administrator for Enforcement and Compliance Assurance (OECA), on May 19, 2014 pursuant to the Army's April 15, 2014 request to confer with you prior to EPA's finalization of the proposed order. At that meeting, I outlined the Army's legal, policy, and practical objections to this unprecedented order (see attached). Regrettably, a meaningful discussion concerning EPA's rationale for the order or its implications for the Department of Defense did not occur; however, Ms. Giles advised me she would consider the Army's objections.

Section 6001(b) of RCRA provides that before an administrative order issued to a federal agency may become final, EPA must afford the agency an opportunity to confer with EPA's Administrator. While the Army has been advised you delegated this authority to Ms. Giles, the delegation also provides that the Assistant Administrator first consult with you before exercising this authority. I understand this advance consultation did not occur and do not believe my meeting with Ms. Giles provided a meaningful opportunity to confer regarding this important matter. Therefore, I respectfully request an opportunity to confer with you regarding both the critical legal and policy issues outlined in the attached paper and the Army's proposed alternative solution. Through such a discussion, I believe we may be able to avoid an interagency Executive Branch dispute.

I look forward to conferring with you personally on this matter. I also request the courtesy of an advance notice if EPA decides to finalize the order, notwithstanding the Army's objections. I am forwarding a copy of this letter to Ms. Giles.

Sincerely,

Katherine Hammack

**EPA UNILATERAL ORDER UNDER RCRA §7003
CAMP MINDEN PROPELLANT OWNED BY STATE
ASA(IE&E) CONFERENCE WITH EPA AA(OECA)
STATEMENT OF ARMY POSITIONS
19 MAY 2014**

Thank you for this opportunity to meet and confer as provided in the proposed RCRA Unilateral Administrative Order. This order is a matter of very serious concern to the Army for several reasons. There are three main reasons why the Order should be withdrawn or not finalized that I want to discuss this afternoon:

First, the personal and real property under question are not Federal property, all actions taken are on non-Federal real property leased from the State of Louisiana, and concern items now owned by the State.

Secondarily, the “prop charges” that were being demilitarized by Explo Systems Incorporated at Camp Minden are not solid waste under RCRA and thus are outside of RCRA’s purview.

And finally, the Army had no authority over storage, inspection or control of, Explo’s operations regarding the propellant after demilitarization of the prop charges was complete.

For the reasons stated in the Army’s April 15, 2014 reply and today, I ask that the RCRA Unilateral Administrative Order be withdrawn or not finalized. The Army does not have the authority or appropriations to conduct the work required by the Order to enter State land and destroy State property.

NOT ARMY PROPERTY

First, I would like to reiterate that neither the real nor personal property at issue in the Order are property of the Army nor under the Army’s jurisdiction. After the prop charges were demilitarized by Explo Systems, Inc., title to the useful components transferred to Explo. Explo controlled its operations related to the prop charge components on land leased from the State, and documented to the Army that it had completed or made arrangements to transfer all the useful components to third parties. The Army had no ownership interest in the components at that point, no ownership interest in the land, no regulatory authority or administrative jurisdiction over Explo’s storage area, and no knowledge of Explo’s storage of the propellant in

locations outside of Explo's leased igloos. Moreover, the State has now taken title to the propellant at Camp Minden pursuant to its motion to the United States Bankruptcy Court.

The State owned propellant is in storage on State real property within an area controlled by the Louisiana Military Department ("LMD"), which does not allow for public access. On or about January 1, 2005, the Army transferred ownership of the Louisiana Army Ammunition Plant to the State of Louisiana. The Louisiana Military Department was designated to accept the property on behalf of the State of Louisiana. The State, as the owner of the propellant at Camp Minden, has responsibility to inspect storage procedures and provide stability monitoring of the propellant.

NOT SOLID WASTE

Second, the Army artillery propelling charges ("prop charges") that were being demilitarized by Explo Systems Incorporated at Camp Minden were not solid waste under RCRA. Demilitarization is not disposal. Demilitarization eliminates the military design features of a military item, and in this case, demilitarization involved dismantling and reuse of munition components. The Army "R3" program (reuse, recovery, and recycle) is a critical part of the ammunition demilitarization program of DoD.

The mandate of Executive Orders that pertain to waste reduction has been in place for well over 20 years. Executive Order 13423 requires the Army to ensure that it "(i) reduces the quantity of toxic and hazardous chemicals and materials acquired, used, or disposed of by the agency, (ii) increases diversion of solid waste as appropriate, and (iii) *maintains cost-effective waste prevention and recycling programs in its facilities.*"

Executive Order 13514 expands on this, and requires the elimination of waste by "(ii) diverting at least 50 percent of non-hazardous solid waste, excluding construction and demolition debris, by the end of fiscal year 2015; ... [and] (v) reducing and *minimizing the quantity* of toxic and hazardous chemicals and materials acquired, *used, or disposed of*".

The 155 millimeter prop charges had become obsolete; however, they contain useful product components that could be recovered after demilitarization for commercial sale and use by others, which is beneficial to the environment, helps the Army achieve mandatory Federal waste reduction goals, and saves large sums of Federal tax dollars. Thus, the Army did not "contribute" to the

handling of solid waste at Camp Minden. The prop charge demilitarization resulted in useful products which were transferred to Explo pursuant to waste reduction mandates.

For each prop charge that Explo dismantled, the following useful products were recovered:

Wood pallets, Metal canisters, M6 propellant, Clean Burning Igniter (CBI), black powder spot charge, potassium sulfate, lead foil liner, and strapping pallets.

Under RCRA regulations, the prop charges were unused munitions being disassembled for materials recovery activities, and are excluded from the definition of a solid waste in 40 CFR Section 266.202(a)(2). Because the demilitarization process did not result in any discarded material, with the possible exception of a cloth bag, these activities are outside of RCRA's purview.

PROPER CONTRACT OVERSIGHT

Third, the Army exercised no direction over, or inspection or control of, Explo's operations regarding the propellant after demilitarization of the prop charges was complete, and had no authority to do so because title transferred to Explo. The Army and DCMA had no authority to extend oversight after the demilitarization was complete to the Explo operations involving the components owned by Explo.

The Louisiana Military Department, however, had unfettered authority under the lease to inspect and exercise control over the use of the leased land by Explo. The Louisiana Department of Environmental Quality issued a RCRA treatment, storage and disposal unit permit to Explo for hazardous waste management units on the leased area where the components were stored. This permit establishes inspection authority in the LDEQ and indicates that LDEQ did not consider all the propellant and other components that Explo stored at Camp Minden to be solid or hazardous waste. Finally, the United States Bureau of Alcohol, Tobacco and Firearms and the Louisiana State Police both issued licenses, subject to inspections and enforcement by the issuing agency, to Explo to possess explosive materials at Camp Minden in the commercial area of operations.

Contract oversight to performance standards, which holds the contractor responsible for adequate performance and compliance with all requirements

that apply to their operations, is a matter of long standing Federal procurement policy. Operations after demilitarization and managing materials owned by the contractor on land leased from the State by the contractor were strictly a private commercial operation. Army and DoD oversight authority and responsibility does not extend to contractor-owned material on non-Army/DoD property.

CERCLA operator liability is based on actual involvement and oversight of operations on a facility that relates to waste management. Federal courts have held that the United States does not have operator liability for independent contractor operations unless actual oversight was conducted of the contractor's daily operations, to include waste management areas.

PROPOSED SOLUTION

The Army has no authority or appropriations to conduct the work stated in the EPA order. The propellant at Camp Minden is property owned by the State and located on State owned land. As such, Army environmental restoration appropriations, Army O&M appropriations, and Army procurement appropriations are not available for the purposes stated in the EPA order. The Army has no authority to enter the State land and destroy the State's property, or to carry out as an Army mission the elimination of State owned solid waste on State land.

There is a solution for resolution of the Camp Minden propellant that does not involve proceeding with the order as drafted:

- First, the State needs to provide for stability monitoring of the propellant.
- Second, the State can sell or transfer the monitored propellant to commercial entities as useful products.
- Lastly, the Army and DoD are willing to provide technical advice to EPA and the State.

This solution set would be more beneficial to the environment, can be carried out at low cost, has the benefit of avoiding an interagency Executive Branch dispute, and is less likely to result in litigation against the United States.

Again, this extraordinary Order is unprecedented. If we are unable to resolve this matter, the Army and DOD will have to consider other options. Because the Army finds the Order to be unfounded in the law, if you determine the Order will be finalized, the Army requests to confer with the EPA Administrator for her review of the critical policy and legal issues presented today and in the Army's reply to the order.

Thank you for your time and attention today.